

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

FRIDAY, THE 30TH NOVEMBER 2007 / 9TH AGRAHAYANA 1929

RFA.No. 377 of 2003()

OS.211/1995 of SUB COURT, MAVELIKKARA

.....

APPELLANT/1ST DEFENDANT

GOPALAKRISHNAN S/O. VELU AGED 56,
VALASSERIL HOUSE, NANGIARKULANGARA,
ALAPPUZHA DISTRICT.

BY ADV. SRI.S.SREEKUMAR

RESPONDENTS: PLAINTIFFS AND DEFENDANTS 2 AND 3

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1. SURESH, AGED 39 YEARS, S/O. SADANANDAN,
THOTTATHIL VEEDU, BHARANICAVU NORTH, BHARANICAVU.
 2. SUMA, AGED 33 YEARS D/O. VASANTHI,
THOTTATHIL VEETIL, BHARANICAVU NORTH,
BHARANICAVU.
 3. L.SHAJI AGED 45 YEARS, SURYA BHAVAN,
NANGIARKULANGARA P.O.
 4. BABU AGED ABOUT 32 YEARS,
PALLIPARAMBIL, NEAR C.S.I. CHURCH,
THOTTARAMBALAM P.O.,MAVELIKKARA.

R1 BY ADV. SRI VAKKOM N. VIJAYAN.

BY SR. ADV. SRI A.M.SHAFFIQUE
SRI.E.K.NANDAKUMAR
SRI.K.JOHN MATHAI
SRI.A.K.JAYASANKAR NAMBIAR
SRI.P.BENNY THOMAS

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 30/11/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ORDER ON I.A.NOS.2169/03 & 1988/05 IN R.F.A.NO.337/2003

Dismissed

Sd/- P.R.RAMAN, JUDGE.

30/11/2007

Sd/- V.K.MOHANAN, JUDGE.

P.R.RAMAN & V.K.MOHANAN, JJ.

R.F.A.NO.377 OF 2003

Dated this the 30th day of November, 2007

JUDGMENT

Raman, J.

This is an appeal against the judgment and decree passed by the Subordinate Judge's Court, Mavelikara in O.S.No.211/95. First defendant is the appellant. Plaintiff instituted the suit for specific performance of an agreement for sale. Ext.A2 is the agreement dated 30/7/1994 executed in favour of the plaintiffs. According to the plaintiffs, the plaint schedule property belonged to the 1st defendant (appellant herein). His father died and thus the 1st defendant has become the absolute owner of the property, which was agreed to be sold for a total consideration of Rs.4,06,000/- out of which Rs.1,50,000/- was paid on the date of the agreement. Agreement was signed by the 1st defendant on 30/7/94. After evicting the tenants from the two rooms of the building and after shifting the residence of the 1st defendant from the other two rooms, the plaintiff requested the 1st defendant to execute the sale deed, after receiving the balance consideration. But the 1st defendant did not heed to the request. The

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agreement dated 30/7/1994 is stated to be in continuation of the previous agreement dated 3/5/94. After issuing registered notice, the suit was instituted. It is stated that the plaintiff is always willing and ready to perform his obligation by paying the balance consideration. But the 1st defendant committed breach of the agreement. The plaintiff also sought for an amount of Rs.40,000/- per month as mesne profits from the date of deposit of the balance sale consideration. The 1st defendant in his written statement admitted the execution of the sale deed for a total consideration Rs.4,06,000/-. But he denied the receipt of an amount of Rs.1,50,000/-. According to him, only an amount of Rs.15,000/- was received by way of advance and the balance amount of Rs.1,35,000/- was promised to be paid within two months from 30/7/1994, the date of the agreement. But the same was never paid later. The two tenants in the shop rooms refused to vacate, in spite of efforts made by the 1st defendant. The calculation of the balance sale consideration as per the plaint is false and not acceptable to the 1st defendant. The plaintiffs were not willing to pay the balance consideration. Defendants 2 and 3 are not necessary parties.

2. The court below framed necessary issues and one of the issues was as to whether the 1st defendant had received Rs.1,50,000/- as advance

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sale consideration from the plaintiffs. Besides whether the plaintiffs were willing to perform their part of the agreement and they are entitled to specific performance of the agreement were also raised for consideration.

3. PWs.1to 3 were examined on the side of the plaintiffs. Exts.A1 to A4 were also marked on their side. No documentary evidence was adduced on the side of the defendants and the 1st defendant gave evidence as DW-1. The court below considered all the issues together for the purpose of convenience. In the light of the clause contained in the agreement regarding the advance payment of Rs.1,50,000/- it was held that no oral evidence could substitute the recitals contained in the written document nor is it permissible under Section 92 and 93 of the Evidence Act. The court below did not give credence to the oral testimony of DW1 holding that a literate person could not have acknowledged the receipt of Rs.1,50,000/-, if actually the consideration paid was only Rs.15,000/-. The burden to prove that only Rs.15,000/- was paid as against Rs.1,50,000/- recorded in the agreement itself, was on the defendant, since he is contradicting the terms contained in the agreement. The plaintiff examined PW-3 who is the licensee and scribe in Ext.A2. He identified the handwriting in Ext.A2. He also deposed that he had seen the passing

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of part consideration under Ext.A2. The court below believed his deposition as true. The court below therefore rejected the plea of the defendant in this regard. The discussions on the relevant issues are contained in paragraph 6 of the judgment. The court below rejected the oral testimony of DW1, but failed to see that the plaintiff did not even mount the box. But in spite of that, the court below did not accept the testimony of DW-1 stating that it is an interested testimony and drew an inference that a literate person like the 1st defendant would not affix his signature in Ext.A2 to vouchsafe or acknowledge receipt of Rs.1,50,000/-, if as a matter of fact, what was paid was only Rs.15,000/-. The court below found that the burden to show that only an amount of Rs.15,000/- was received by the 1st defendant is on him. At the same time, according to the court below, it is difficult to establish the same. In the absence of any evidence on the part of the defendants to show that what was received is only Rs.15,000/-, the case as put forth by the defendants was not accepted. According to the court below, the document having recited the receipt of consideration of Rs.1,50,000/- execution of which is not disputed, there is no further onus on the part of the plaintiffs to discharge. In these circumstances, the court below rejected the contention as set up

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by the defendants.

4. The learned counsel appearing on behalf of the appellant contended that the finding of the court below precluding the defendants from adducing any oral evidence to prove that the recitals contained in Ext.A2 showing a larger amount as received by way of advance are untrue is not prohibited by Sections 91 and 92 of the Indian Evidence Act. He placed reliance on some of the decisions in support of his contention. In **Mathew v. Lakshmanan (1990 (2) KLT 446)** a Division Bench of this Court considered the very same question. That was also a case of specific performance. There is an acknowledgment of an amount of Rs.3,000/- by way of advance as per the recitals contained in Ext.A1 agreement for sale. Contrary to the said recitals it was contended by the defendant that he has not received the sale consideration. The trial court by relying on Sections 91 and 92 of the Evidence Act held that the defendant would not have been permitted to lead oral evidence against the express terms contained in the agreement. In paragraph 9 this Court posed the question as to whether the trial court was justified in its assumption that the defendant was precluded by the provisions of Sections 91 and 92 of the Evidence Act from leading oral evidence to the effect that the plaintiff had not paid

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the advance of Rs.3,000/- and the defendant had not put the plaintiff in possession as a consequence thereof of the thatched shed, which formed part of the plaint property. After referring to the provisions contained in Sections 91 and 92 of the Evidence Act and after referring to some of the case law on the subject including the decisions of this Court in **Thommen v. Taluk Land Board (1976 KLT 840)** and **Kunhammed Kutty v. Avokker (1984 KLT 716)** it was held that the decisions have kept the nice but real distinction between the terms of the contract and recital of fact therein. The courts have always held, that consideration for the contract not being a term of the contract, it is open to the vendor to lead oral evidence to the effect that no consideration or only part thereof was actually received, notwithstanding recitals in the contract. It will therefore be competent to a party to a contract to adduce evidence to prove want or failure of consideration. Want or failure of consideration invalidates the document, so that the terms of the above proviso automatically applies. The assumption of the trial court that Sections 91 and 92 of the Evidence Act operated to exclude oral evidence in support of the specific plea of the defendant-appellant, that the advance, recited in Ext.A1 document, was not paid, is therefore clearly faulty. In the light of

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the decision as laid down by a Bench decision of this Court in categorical terms which are in identical situation, it has to be held that the finding of the court below precluding the defendants from adducing any oral evidence contrary to the recitals contained in Ext.A1 is not correct in law. When such contention is available to be raised and evidence adduced, necessarily such evidence adduced will have to be weighed. As against the oral testimony of DW1, who said that he has not received the amounts as recited, the plaintiff did not rebut the same by mounting the box. Onus thus shifted on the person, who alleges that the entire amount of Rs.1,50,000/- has in fact been received by the defendant. Proof of payment being a positive fact can easily be proved by the party, who pleads the same by cogent evidence. It is open to them to prove the source from which the amount was raised and paid. Thus the court below was no right in casting the entire burden on the defendants to prove that over and above Rs.15,000/- they have not received anything further.

5. In this case Ext.A2 is an agreement for sale and there is hardly any dispute on that. The plaintiff has specifically pleaded that he was ready and willing to perform his part of his obligation by paying the balance consideration, but he did not mount the box to give evidence in

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support thereof. Since this was denied by the defendants, it is for the plaintiff to establish the same. On the side of the plaintiff, the power of attorney holder was examined as PW-1. There was a dispute that the plaintiff has not executed any power of attorney in favour of PW-1 as per Ext.A1. But the court below did not consider as to whether Ext.A1 power of attorney was executed in favour of PW-1 or not; but held that in view of the previous orders passed, the plea is barred by explanation 4 of Section 11 of the C.P.C. It is true that there was an ex parte decree passed earlier in favour of the plaintiff, but the same was set aside on an application made by the defendants. Thus whatever finding in the ex parte order stood set aside. Hence that order cannot be a bar under Section 11 of the C.P.C. The suit itself has to be tried denovo and there was no decree in the eye of law. Every issues that arise for consideration have to be considered, in the light of the materials placed.

6. According to the defendant, the plaintiff was not available in India at the time of institution of the suit and disputed the signature in the plaint. The lower court has referred to this contention in paragraph 12 of the judgment. But the court below repelled these contentions holding that these contentions are not raised in the written statement or in the proof

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affidavit of DW-1 and therefore, there is no substance in the contentions made. It must be remembered that there was no occasion for the defendant to be suspicious about the signature until the original was seen by him and hence there was no occasion to raise any plea in the written statement. But later when it came to his knowledge that the plaintiffs were not available during the period when the plaint was presented before the court below, he had made suggestions regarding the same to the witnesses examined on the side of the plaintiffs. We have gone through the original of the plaint and the signatures put on the bottom of every page of the plaint and found that the signature in each of the page differs from other. Together with this the plaintiffs have not mounted the box to give any evidence in support of the plaint allegations. Plaintiff, is not an ordinary resident in India. Hence, when a serious dispute is raised regarding the presence of the plaintiff on the day when the plaint was presented, in the factual background, the court below ought to have enquired into the same and if only the plaint was perused, it would have come to light that there is serious doubt to think that it is not the plaintiff who has signed the plaint. At any rate, the court below ought to have, after giving an opportunity of being heard in the matter, dealt with the

question in more detail than precluding the defendants from raising this contention on the sole ground that in the written statement they have not raised this contention. If a plaint presented to the court was not signed by the plaintiff, necessarily, the allegation of impersonation could not have gone unnoticed. Further a power of attorney holder is not competent to depose as to the plaint averments when the suit itself is laid not by the power of attorney holder. The deposition of the power of attorney holder at best could be an evidence in the case; but when the plaintiff himself has not mounted the box, in such circumstances, there arises suspicion about the genuineness of the case put forth in the plaint. In this connection, it may be noticed that PW-1 power of attorney holder himself admits in the cross-examination that for the past 20 years the 1st plaintiff was abroad and the 2nd plaintiff was abroad for the past six years. He also admits that the 2nd plaintiff alone was available in India on 13/7/1997 and the 1st plaintiff was not available in India. The date of the plaint is June, 1995. In this connection, it is rightly pointed out by the learned counsel for the appellant that even PW-2 has admitted while in the box about the non-availability of the plaintiff at the time of presentation of the plaint.

7. In the decision reported in **Vidhyadhar v. Manikrao and another** ((1993)3 SCC 573) the Apex Court in paragraph 17 held as follows:

"Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct....."

8. It is true that two other witnesses were examined as PWs.2 and 3 on the side of the plaintiff to prove the execution of Ext.A2. The court below accepted the execution of Ext.A2. Even though it cannot be said that the execution of Ext.A2 can be seriously disputed by the defendants, the court below has necessarily to consider as to whether a discretionary relief could be granted in favour of the plaintiffs. It is settled law that specific performance being a discretionary remedy is not to be granted merely because it is lawful to do so. If there are sufficient grounds, necessarily, instead of granting discretionary relief, only the alternative relief of return of advance with interest could be granted. The court below has entered a finding that nothing was shown by the 1st defendant questioning the plaintiffs 1 and 2 so as to dis-entitle them to obtain a

decree. It has to be mentioned that the plaintiffs' presence at the time of presentation of the plaint itself is seriously disputed. The signature of the plaintiffs in the plaint differs. There is also a serious dispute as to what is the actual amount of consideration received. Plaintiffs have not mounted the box. These circumstances were not considered by the court below before granting the discretionary remedy. We find that the court below did not exercise the discretion, after proper appreciation of the entire facts and circumstances.

9. The learned Senior Counsel Sri A.M. Shaffique appearing on behalf of the respondents however submitted that the signature contained in the plaint or any defect thereon will not affect the jurisdiction of the court. In this regard it is submitted by the learned counsel for the appellant that this is not a case of mere irregularity, but is a case of impersonation, which allegation is taken note of even in the judgment under appeal. However, there was no consideration of this question.

In the result, the judgment and decree of the court below is set aside. The matter is remanded to the trial court for fresh consideration in accordance with law. Now that we are remanding the matter for fresh consideration, necessarily the question as to whether the plaintiff was

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present at the time when the plaint was presented in court and whether the plaint was signed by him has also been enquired into by the court below, after affording an opportunity of being heard to both sides in this regard.

Court fee paid is ordered to be refunded. The parties shall appear before the court below on 3rd January, 2008.

Sd/-
P.R.RAMAN,
Judge.

Sd/-
V.K.MOHANAN,
Judge.

kcv.